(4)

No. 04-624

DEC 23 2004

In The Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE, SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF NORTH DAKOTA, ARIZONA, CALIFORNIA, CONNECTICUT, IOWA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NEW MEXICO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE

This amicus curiae brief in support of the Certiorari Petition is respectfully submitted under Sup. Ct. R. 37(4).

SUMMARY OF ARGUMENT AND STATEMENT OF AMICI INTEREST

The amici states urge the Court to grant certiorari and review the decision below holding Idaho's motor fuel tax an impermissible tax on Indian tribes. The amici states, like Idaho, all rely on a motor fuel tax to fund highway construction and maintenance, and all have Indian lands within their borders. A limit on the amici's authority to apply the tax uniformly throughout the state will inhibit their ability to provide their citizens with a modern necessity – a comprehensive, safe transportation system.

State motor fuel taxes are dedicated to building and maintaining highways. The tax is thus unique in that it facilitates the very activity to which it relates – operating motor vehicles. The tax is an essential funding source that allows the amici to provide roads to all citizens, Indian and non-Indian, and to all areas of their states, reservation and non-reservation. The tax implements a state policy ensuring that all persons who benefit from the transportation infrastructure bear a fair share of its costs.

Congress recognized these state interests when it enacted section 10 of the Hayden-Cartwright Act. Act of June 16, 1936, § 10, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104). The statute's language meshes directly with the congressional purpose; that is, the Act subjects motor fuels sold on "reservations" to those

same taxes imposed elsewhere, thereby ensuring that all fuel sales in a state are taxed. By virtue of the Hayden-Cartwright Act, tax-free havens are eliminated.

The Ninth Circuit's decision disrupts a long-standing, even-handed method by which states fund their duty to provide a basic service. In doing so, the Ninth Circuit diluted an essential part of state taxing powers – the authority to define the legal incidence of state taxes. Not long ago this Court recognized such a state right, and did so in an Indian tax case. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

In *Chickasaw Nation*, the Court helped simplify Indian tax law by acknowledging that it is a state function to identify the incidence of a tax. *Id.* And this is just what the Idaho legislature did in 2002 with its tax. *Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 680 (9th Cir. 2004). The majority of the Ninth Circuit panel, however, after declining to apply *Chickasaw Nation* and the state legislature's expressly stated intent, was then forced to comb the Idaho legislation and "germane" circumstances to locate the "true" incidence of the tax. *Id.* at 685.

By disregarding a state legislature's expressly stated intent, the majority below muddied an area of tax law the Supreme Court sought to clarify. The majority then went on to disregard a clearly written federal statute, Section 10 of the Hayden-Cartwright Act, which opens "reservations" to state motor fuel taxes. Rather than accept the plain meaning of "reservation," the majority found the word ambiguous.

The majority's analysis of the Hayden-Cartwright Act was predicated on applying one canon of construction used in Indian law to the exclusion of another "Indian canon."

To guide its interpretation, the majority relied on a canon providing that state taxes apply to tribes only if Congress allows in "'unmistakably clear'" terms. *Hammond*, 384 F.3d at 692 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). The majority applied the "unmistakably clear" test to the exclusion of the competing canon, the "general statute" rule. *Id.* The "general statute" rule provides that federal statutes of general applicability apply to Indians and to tribes just as they do to all the nation's citizens and areas. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 115-21 (1960). While the majority acknowledged the "general statute" rule, and while the Hayden-Cartwright Act is unquestionably a general statute, the majority declined to apply, or even discuss meaningfully, the rule.

In sum, the majority of the Ninth Circuit panel failed to follow this Court's instruction in *Chickasaw Nation*. In doing so, it transposed a bright-line test – states define the incidence of state taxes – into one that will have the judiciary searching dark corners for the "true" incidence of a state tax. The majority also failed to respect clear language in the Hayden-Cartwright Act, and in doing so, ignored this Court's jurisprudence on construing statutes of general application. Granting the Petition will give the Court the opportunity to reaffirm state authority over state taxes, to resolve the tension between competing canons of construction, and carry out Congress' manifest objective in adopting the Hayden-Cartwright Act.

Amici states have three primary interests in having the Petition granted.

First, amici states have a duty to provide their citizens with a well-developed and safe transportation

network. This can only be accomplished through tax revenue, an important source of which is the motor fuel tax. The tax is a fair one. It applies even-handedly to those that use the roads, and its benefits are spread even-handedly throughout the state. Indian lands and Indian citizens fully share the benefits of the motor fuel tax. Money raised by this tax is almost entirely devoted to constructing and maintaining highways. *See, e.g., Hammond*, 384 F.3d at 679 ("Substantially all proceeds from the [Idaho] motor fuel tax are used for highway construction and maintenance"); N.D. Const. Art. X, § 11; S.D. Codified Laws § 10-47B-148, 149. Amici have an intimate interest in protecting their financial ability to provide roads on and off reservations. This is particularly so where the motor fuel tax has been in place and unchallenged for many decades. U.S. Dep't of Transp., *America's Highways 1776-1976: A History of the Federal-Aid Program* 114 (1976) (tax generally in place by the 1920s).[1]

The majority's decision creates geographic, tax-free vacuums. The areas in which this will occur will be extensive. There are about 560 federally recognized tribes. 68 Fed. Reg. 68,180-01 (Dec. 5, 2003). Most tribes have reservations, which can contain huge amounts of land. For example, the Standing Rock Reservation, which straddles the North Dakota-South Dakota border, contains about 2.3 million acres. Mary Jane Schneider, *North Dakota Indians: An Introduction* 147 (1994). The Ft. Totten Reservation, now known as the Spirit Lake Reservation,

[1] North Dakota's motor fuel tax has been in place since 1926. I.M. June 30, 1926, 1927 N.D. Sess. Laws 547. South Dakota's has been in place since 1923. 1923 S.D. Sess. Laws ch. 225.

covers about 200,000 acres and the Ft. Berthold Reservation almost one million acres. *Id.* at 138, 142. Thus, the tax-free areas will be numerous and large. Amici states have an interest in limiting within their borders geographic tax havens. This is particularly so where amici have the duty to provide good roads to the tax-free areas.

And states do construct and maintain roads on reservations and other Indian lands. For example, there are three state highways on North Dakota's Spirit Lake Reservation, covering about 74 miles. There are six North Dakota state highways on the Ft. Berthold Reservation and four on the Standing Rock Reservation, covering about 147 and 108 miles. The state keeps these roads free of snow and ice in the winter and maintains them in the summer, work that, over the past ten years, has cost about $8.8 million. Further, 37% of North Dakota's motor fuel tax is distributed to counties and cities for local roads. N.D.C.C. § 54-27-19. Thus, the tax funds not only state highways but also secondary roads on reservations.

Second, amici states have a significant interest in controlling their tax systems. Indeed, this Court in *Chickasaw Nation* recognized that it is a state prerogative to identify the legal incidence of state taxes. Amici have an interest in maintaining this traditional power. This state function should not be replaced with a rule that allows the judiciary to engage in a substantially standardless search to locate the "true" incidence of a state tax. Such a rule is of uncertain application and will produce litigation.

Third, amici states have a keen interest in the proper interpretation and application of Indian canons of construction. It is not uncommon for states and tribes to disagree over the scope of their respective governmental

powers. And taxation has been one of the more common areas of dispute. *See, e.g., County of Yakima v. Confed. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943).

State-tribal disputes often involve federal statutes. Such disputes are more likely avoided, and if not avoided, more readily resolved with clear rules of statutory construction, consistently applied by the judiciary. This Court has developed canons of construction applicable to Indian law issues, but the canons may not be entirely consistent and have not always been faithfully applied by lower courts. One canon provides that while Congress may allow states to tax tribes, its intent to do so must be "unmistakably clear." Another canon provides that when Congress enacts a statute generally applicable to all citizens and areas, the statute applies to tribes "in the absence of a clear expression to the contrary." *Tuscarora*, 362 U.S. at 120. In construing the Hayden-Cartwright Act, a statute of general applicability, the majority below applied the "unmistakably clear" rule to the exclusion of the "general statute" rule. Further, lower courts have carved numerous exceptions into the "general statute" rule. This Court should grant certiorari to address the tension between these two rules of statutory construction, reaffirm the "general statute" rule, and give the Hayden-Cartwright Act the application Congress intended with its use of the clear word "reservations."



ARGUMENT

I. In *Chickasaw Nation* the Supreme Court recognized a state's right to define the legal incidence of state taxes. The court below departed from *Chickasaw Nation* by rejecting the Idaho legislature's express identification of the legal incidence of the state motor fuel tax.

In *Chickasaw Nation*, the Court considered Oklahoma's taxation authority over the Chickasaw Nation and its members. At issue was Oklahoma's tax on motor vehicle fuel sold at tribal gas stations. 515 U.S. at 453. Because of Oklahoma's failure to timely raise the Hayden-Cartwright Act, the Court did not consider the Act. *Id.* at 456. But it did extensively discuss "legal incidence" issues.

The Court stated that the "frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of the tax." *Id.* at 458. If the incidence rests on non-Indians, there is then no categorical bar that prevents enforcing the tax. *Id.* at 459. The Oklahoma motor fuel tax statute did not expressly identify who bore the tax's legal incidence. *Id.* at 461. This absence of clarity was significant. It opened the door to judicial construction of the statute to identify the taxpayer. "In the absence of such dispositive [statutory] language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Id.* (quoting *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)). Upon interpreting the Oklahoma statute, the Court found that it imposed the tax on Indian retailers and, therefore, it was impermissible. *Id.* at 461-62.

The Court made three significant rulings in discussing the legal incidence of Oklahoma's motor fuel tax. In considering Idaho's motor fuel tax, the majority below disregarded each ruling.

First, the Supreme Court stated that the "[j]udicial focus" is on the legal incidence. *Id.* at 459. It then looked to the state statute to identify the legal incidence, but the statute was unclear. It was "the absence of such dispositive language" in the statute that opened to door to judicial construction. *Id.* at 461. The necessary implication is that had the statute clearly defined the legal incidence, its "dispositive language" would have settled the matter. Thus, the rule of *Chickasaw Nation* is that a state statute – even one involved in an Indian tax case – can contain dispositive language identifying the legal incidence of the tax. Idaho's statute contains such language. It expressly identifies non-Indian distributors as the taxpayer. *Hammond*, 384 F.3d at 680.

The Ninth Circuit majority, however, ruled that it had no obligation to defer to Idaho's express statement of intent, finding that when tribal interests are at issue, a different rule applies. *Id.* at 682-83. This analysis neglects the fact that tribal interests were at stake in *Chickasaw Nation*.[2]

In *Chickasaw Nation*, the Court rejected applying an "economic realities" test in favor of the "legal incidence"

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[2] The decision below is also directly contrary to *Pourier v. South Dakota*, 658 N.W.2d 395, 405, *vacated in part on rehearing on other grounds*, 674 N.W.2d 314 (S.D. 2004), *cert. denied*, ___ U.S. ___, 124 S.Ct. 2400, 158 L.Ed.2d 965 (2004).

test. It stated that if it were to apply an "economic realities" test it would force courts into a potentially complicated market analysis and create more litigation. *Id.* at 459-60. The "legal incidence" test is preferable because it provides "'a reasonably bright-line standard which . . . responds to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Id.* at 460 (quoting State of South Dakota, et al. Amicus Curiae Brief at 2). *See also Crow Tribe v. Montana,* 650 F.2d 1104, 1111 (9th Cir. 1981) (identifying the legal incidence of a tax should not "extend to divining the legislature's 'true' economic intent").

Despite this guidance, the Ninth Circuit majority, after disregarding what should have been "dispositive language" in the Idaho statute, embarked on an "economic realities" investigation to find the "true" legal incidence. *Hammond,* 384 F.3d at 685-88. After identifying the "probable operational effects" of Idaho's tax, the majority found that the legal incidence fell on Indian retailers. *Id.* at 688. In sum, the majority rejected *Chickasaw Nation's* bright-line standard and applied one that will lead to uncertainty and litigation. The dissent accurately described the majority's approach as a "highly indeterminate analysis." *Id.* at 696 (Kleinfeld, J., dissenting).

Second, Chickasaw Nation provides clear guidance on what a state might do in the event a state tax is ruled unenforceable.

> And if a State is unable to enforce a tax because the legal incidence of the impost is on Indian or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence.

515 U.S. at 460. Idaho followed this advice. After the state Supreme Court invalidated the Idaho tax, Idaho amended its law to shift the tax's legal incidence to non-tribal distributors. *Hammond*, 384 F.3d at 680. But the majority below ruled that this Court really did not mean what it wrote in *Chickasaw Nation*, and that even if a state amends its statute with what should be dispositive language, a court can nonetheless search the statute, its "operational effects," and "germane" circumstances to itself locate and identify the legal incidence, that is, to substitute judicial construction for express legislative statement. *Id.* at 685, 688. Here, that judicial re-write of the Idaho legislature's unambiguous language involved engaging in such subjective exercises as evaluating whether a statutory amendment was "minimal" or "cosmetic." *Id.* at 684-85.

Three, the foundation of *Chickasaw Nation* is the Court's concern for certainty. It wanted a "categorical approach" to safeguard against litigation. 515 U.S. at 460. It wanted an approach that "accommodates the reality that tax administration requires predictability." *Id.* at 459-60. The same policy objective has been expressed in other Indian tax cases. *E.g., Arizona Dep't of Revenue v. Blaze Constr. Co*, 526 U.S. 32, 37 (1999) ("interest balancing . . . would only cloud the clear rule established . . . in *New Mexico*"); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 267-68 (1993) (a categorical approach to a property tax issue protects against litigation). The decision below upsets policy set in *Chickasaw Nation* and other Indian tax cases.

In sum, the decision below disregards much of *Chickasaw Nation*. In doing so, the majority seems influenced by an unwarranted view of states and their modern-day

relations with tribes. The majority stated that if it ruled any other way it would permit states "to threaten the very existence of the Tribes." *Hammond*, 384 F.3d at 684. Such an overblown concern may have led to a ruling that departs so strikingly from *Chickasaw Nation*.

II. In the Hayden-Cartwright Act Congress opened *all* federal "reservations" to state motor fuel taxation. The court below, however, found "reservations" ambiguous and, applying the wrong canon of construction, ruled that "reservations" does not include Indian reservations.

A. The Hayden-Cartwright Act is a statute of general applicability. Therefore, the Act is governed by the "general statute" rule, which provides that all citizens, including Indians, are subject to general statutes.

The majority below began its Hayden-Cartwright Act analysis by referring to the canon of construction providing that state taxes do not extend to tribes unless Congress so allows in "'unmistakably clear'" language *Hammond*, 384 F.3d at 692 (quoting *Montana v. Blackfeet*, 471 U.S. at 765). In applying this canon, the majority rejected another. *Id.* It failed to apply the "well settled" rule recognized by this Court in "many decisions," that is, the rule that a general statute purporting to apply to all persons includes Indians and their property interests. *Tuscarora*, 362 U.S. at 116.

Tuscarora concerned the Federal Power Act, which gave condemnation authority to federally-licensed entities. *Id.* at 115. Because the Act's condemnation provision did not specifically refer to Indian land, the Tuscaroras

asserted that the Act was inapplicable to land it owned in fee. *Id.* But there was no need for Congress to have specifically mentioned tribal land because the Act "constitutes a complete and comprehensive plan" for developing and improving navigation and electric power, giving every indication Congress intended to include lands owned by all persons, "including Indians." *Id.* at 118. Consequently, the Act's condemnation provision applied to tribal land. *Id.* The *Tuscarora* rule is that general statutes "apply to Indians as well as to all others in the absence of a *clear expression to the contrary*." *Id.* at 120 (emphasis added).

Thus, this Court has instructed that state taxes apply to Indians only if Congress allows in "unmistakably clear" terms. But it has also instructed that general federal statutes, even those providing for the extraordinary and sometimes harsh power of condemnation, apply to Indians unless Indians are excluded by a "clear expression" of such intent. The Hayden-Cartwright Act is a "general" law. It has general geographic and substantive applicability within the United States as to the subject at hand, that is, fuel sold on "reservations." It addresses national concerns – to provide employment and develop the nation's transportation network – in a national manner. *Tuscarora*'s "general statute" rule applies. *See also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (Freedom of Information Act, a general law, applies to communications between a tribe and federal agency; implicitly applying *Tuscarora*). And because the Hayden-Cartwright Act lacks a "clear expression" to exclude Indians, it applies to Indians.

There are broader, but no less important questions concerning the reach of *Tuscarora* than just those presented by this case. Lower courts have been whittling

away at *Tuscarora*. "[N]umerous federal courts of appeal have rejected [*Tuscarora*] through subsequent action." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp. 1131, 1135-36 (D. Okla. 2001). The Tenth Circuit limits *Tuscarora* to only federal statutes that affect "property rights." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (en banc) (National Labor Relations Act does not preclude a tribe from prohibiting union security agreements). Lower courts have found the Age Discrimination in Employment Act and the Fair Labor Standards Act overtime pay requirements inapplicable to tribal entities. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493-96 (7th Cir. 1993); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993). Review of the decision below will afford this Court the opportunity to reiterate *Tuscarora* and clarify its scope.

B. The word "reservations" clearly includes Indian reservations, and, therefore, the Hayden-Cartwright Act applies to motor fuel sales on reservations.

Even if it were proper to apply the "unmistakably clear" rule and reject the "general statute" rule, the majority below still erred – as Judge Kleinfeld persuasively argued in dissent. The Hayden-Cartwright Act's application to Indian reservations is "unmistakably clear." By using the term "reservations" Congress expressed its intent to subject Indian reservation transactions to state motor fuel taxes.

An Indian reservation, after all, is nothing if it is not a "reservation," that is, an area of land set aside by the

United States for a particular federal purpose. As this Court has stated, "reservation" is a term that describes "*any* body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). The dissenting opinion relied on *Celestine* to conclude that the Act expressly authorizes the tax. *Hammond*, 384 F.3d at 696 (Kleinfeld, J., dissenting). It also relied on the dictionary and ordinarily understood meaning of "reservation." *Id.* at 696-97. And it relied on "settled administrative interpretation," *id.* at 697, that is, the long-unquestioned, executive branch interpretations of the Act. *Id.* at 695 n.28. Any doubt about Congress' intent to include Indian reservations is resolved by the Act's reference to "licensed trader," a term the dissent correctly understood to mean "one and only one thing," a person trading on Indian reservations. *Id.* at 697. Congress was unmistakably clear in opening Indian reservations to state motor fuel taxes.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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